Citation: *R. v. ex-Leading Seaman B.V.P. Sharp,* 2008 CM 1003

Docket: 200746

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE 8 WING TRENTON

Date: 27 February 2008

PRESIDING: M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN
v.
ex-LEADING SEAMAN B.V.P. SHARP
(Accused)

FINDING
(Rendered orally)

Introduction

[1] Leading Seaman Sharp, retired, or ex-Leading Seaman Sharp is charged with two offences punishable under section 130 of the *National Defence Act*; that is to say, assault with a weapon contrary to paragraph 267(a) of the *Criminal Code* and careless use of a prohibited weapon contrary to subsection 86(1) of the *Criminal Code*. He is also charged with an offence laid under section 129 of the *National Defence Act* for conduct to the prejudice to good order and discipline for which the court has accepted and recorded a plea of guilty. So this decision relates to the findings as to the first and second charge. The facts supporting these charges arose from a series of events that occurred at around 1715 hours on 12 November 2006 at 8 Wing Trenton in the military police headquarters building where Corporal Esser and Leading Seaman Sharp, patrol partners, had just returned from their work shift. This was the last shift of Leading Seaman Sharp who was retiring from the Canadian Forces shortly after.

The Evidence

[2] The evidence before this court consists of the following:

A. The testimonies heard during the trial; that is:

1. Corporal Esser, the alleged victim and partner of the accused at the time of the alleged offence with regard to the first charge;

2. Commissionaire Margaret Preston who was working as the military police dispatcher when the alleged offences took place;

3. Sergeant Bradshaw, who is an experienced police officer, who provided training to the accused on the OC spray and who testified as to the proper use and dangers associated with the use of OC spray;

4. former commissionaire Douglas Eugene Sadler who was also a military police dispatcher at the time of the alleged offences; and

5. ex-Leading Seaman Sharp, the accused at trial.

B. The evidence also consists of the admissions made by counsel for the accused, that were filed as Exhibit 3, which reads as follows:

1. This court has jurisdiction over the accused;

2. identity of the accused as the offender is admitted;

3. the alleged offences occurred at 1715 hours on 12 November at 8 Wing Trenton;

4. Corporal Esser did not consent to the accused spraying her with pepper spray;

5. OC spray is a prohibited weapon; and

6. the accused had no lawful excuse for brandishing his OC spray.

C. The evidence is supplemented by Exhibit 4, which is a two-page document consisting of a calendar as well as a course schedule indicating that ex-Leading Seaman Sharp received training on OC spray between 25 and 27 April ‘06; and

D. By the court taking judicial notice of those facts and matters under Military rule of Evidence 15.

The Facts

[3] As stated earlier, the facts surrounding this case took place at around 1715 hours on 12 November 2006 at the military police headquarters at 8 Wing Trenton. There is no dispute with regard to the events surrounding the commission of the alleged offences, and the credibility of the witnesses is not an issue as this was clearly indicated by counsel during their respective submissions.

[4] The evidence indicates that Corporal Esser and ex-Leading Seaman Sharp were returning from their patrol shift which was, in fact, the last shift of Leading Seaman Sharp as a military police person and member of the Canadian Forces because he was taking his voluntary release in order, at least, to be a full-time foster parent for the upcoming future. The testimonies of Corporal Esser and Commissionaire Preston describe the mental state of Leading Seaman Sharp at the time to be what I would resume as or I would capture as being excited and very happy. Mrs Preston described him as smiling, dancing, and joking around. Of course, they all knew each other as being co-workers. Mrs Preston said that she was at her dispatcher's desk when both Leading Seaman Sharp and Corporal Esser arrived at the end of their shift. Leading Seaman Sharp then asked her if she had ever experienced pepper spray and asked her jokingly to spray some pepper spray in her mouth, to which she replied, "No." He asked her again and she gave him the same definite no hiding her face with her hands. Leading Seaman Sharp asked her a third time as she went down the stairs. At no time did Mrs Preston feel threatened in any way by Leading Seaman Sharp's conduct.

[5] As Mrs Preston moved away, Leading Seaman Sharp walked 8 to 10 feet from her desk in the direction of the exit on the west side of the building. He then made contact with Corporal Esser. The evidence shows that, standing jokingly behind Corporal Esser, he took his OC spray canister and, aiming in downward direction at the back of her legs, made a first short blast which hit her at the top of her buttocks as he was less than 4 feet away from her. The first blast was less than one second. He testified that he made the blast in this manner because he wanted to avoid a potential stinging effect and the other risks associated with the use of pepper spray. Corporal Esser immediately felt something humid. She turned around to see Leading Seaman Sharp smiling with the OC spray canister in his hand. She went on and giggled. She then felt another short blast that she described as a mist that touched her on the palm of her right hand. This second blast was shorter in duration than the first blast. She then turned around and made a comment to the effect that she would better wash her hands before touching her face. She continued toward the stairs and she was hit a third time by a quick blast from Leading Seaman Sharp's OC spray canister that touched her on the side of her right hand, more precisely on her small or pinkie finger as she was close

to the stairs on her way to the vault to gun down. She turned around and told him to stop when she may have given him a bad look. She then continued downstairs with Leading Seaman Sharp to the vault in order to gun down and retrieve, of course, their personal effects. She testified that she had the sensation of a burning throat and coughing. These symptoms quickly disappeared once she got outside the building; although she said the burning sensation on her right hand lasted several hours. She said that it was not painful but annoying. Once outside she was met by Mr Sadler who complained that it was difficult to breath in the building to whom she said that she agreed with him. At first Mr Sadler thought that his difficulties were related to flooring chemicals. Corporal Esser said that she felt it was a joke, although she did not like to be the butt of a practical joke. She added that, according to her, it was not an assault, but simply a bad joke. She never lodged any complaint with regards to the actions of her patrol partner.

[6] Mrs Preston testified that she had no idea that pepper spray was used during the period, and she did not associate that use with the smell reported by her replacement that night, Mr Sadler, when he came by to her desk because she could not smell anything, although her throat felt dry which she said had happened before in that building because of air dryness. However, Mr Sadler testified that Mrs Preston had mentioned to him that there was pepper spray in the room when he told her that his throat was very scratchy and sore. So this is a bit of a discrepancy, but it's not significant for the outcome of this case. Mrs Preston added that her discomfort was very short. She said that she felt fine as soon as she went outside the building. According to her, she never suspected that Leading Seaman Sharp had used pepper spray at that time or shortly after his return at approximately 1715 hours in the immediate surroundings of her desk. Several hours later Mr Sadler complained that he had a burning sensation in his eyes, the firefighters were called to check the premises and they asked him to wash his eyes with cold water and, upon doing so, he was fine.

[7] The evidence of Sergeant Bradshaw indicates that Leading Seaman Sharp was properly trained to use the OC spray as an intermediate weapon, he was trained with regard to when and how OC spray should be used. He testified that the training covered how to use the substance indoors or outdoors, not to use OC spray within 3 feet of a subject, not to use the substance on elderly people, infants, or pregnant women. He also described the five methods or patterns to follow when using OC spray as an intermediate weapon. He added that OC spray should not be used on subjects on more than two occasions for more than one or two seconds because of the side effects like burning sensations on exposed skin, the feeling of obstructed airways, and the psychological effects on the subjects of the police use of force. Well, in a nutshell that concludes the summary of the evidence for the purposes of making the findings of this court on the first and second charge.

The Law and the Essential Elements of the Charge

The First Charge (Section 130 of the National Defence Act - Paragraph 267(a) of the Criminal Code)

[8] The first charge alleges a contravention of section 130 of the *National Defence Act* contrary to paragraph 267(a) of the *Criminal Code*. The particulars of that charge reads:

> In that he, on 12 November 2006, at Canadian Forces Base, 8 Wing Trenton, Trenton, Ontario, while committing an assault on Corporal Esser, J., did carry a weapon To Wit: oleoresin capsicum (OC) spray.

[9] It is clear from the evidence, and the facts indicate that Leading Seaman Sharp intentionally used OC spray three times, a prohibited weapon, on Corporal Esser at the time of the alleged offence. The prosecution asked the court to make a special finding to reflect that situation. Defence counsel opposed this request as he argues that the prosecution chose to particularize the offence in a specific way and that Leading Seaman Sharp would be prejudiced in his defence should the court grant the prosecution's request. The court doesn't have to decide on this issue at this stage, but only if the court concludes at the end of its analysis that the facts proved or proven would establish the commission of the offence charged, but on the basis of a materially different fact. Therefore, the court will take a dual approach with regards to the elements of the offence to cover both scenarios. In order to find Leading Seaman Sharp guilty of assault with a weapon the prosecution must prove each of the essential elements beyond a reasonable doubt:

1. That Leading Seaman Sharp intentionally applied force to Corporal Esser J.;

2. that Corporal Esser did not consent to the force that Leading Seaman Sharp intentionally applied;

3. that Leading Seaman Sharp knew that Corporal Esser did not consent to the force that Leading Seaman Sharp intentionally applied; and

4. that a weapon was involved, and I used here involved on purpose in order to capture both the carrying and the use, so that a weapon was involved in Leading Seaman Sharp's assault of Corporal Esser.

The Second Charge (Section 130 of the National Defence Act - Subsection 86(1) of the Criminal Code)

[10] The second charge alleges a contravention of section 130 of the *National Defence Act*, but this time contrary to subsection 86(1) of the *Criminal Code*. The particulars of that charge read:

> In that he, on 12 November 2006, at Canadian Forces Base, 8 Wing Trenton, Trenton, Ontario, did, without lawful excuse, use a prohibited weapon To Wit: oleoresin capsicum (OC) spray, in a careless manner.

[11] In order to find Leading Seaman Sharp guilty of the careless use of a prohibited weapon the prosecution must prove each of the essential elements beyond a reasonable doubt:

1. That Leading Seaman Sharp used a prohibited weapon;

2. that Leading Seaman Sharp used a prohibited weapon in a careless manner; and

3. that Leading Seaman Sharp had no lawful excuse for his use of the prohibited weapon.

Presumption of Innocence and Reasonable Doubt

[12] Well, before this court provides its legal analysis it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is, of course, fundamental to all criminal trials in Canada. Of course, these principles are well known to counsel and, of course, they will not be taking notes when I say that, but other people in this courtroom may well be less familiar with them.

[13] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under the criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It's up to the prosecution to prove its case, on each element of the offence, beyond a reasonable doubt. The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an

accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[14] The term "beyond a reasonable doubt" has been used, of course, for a very long time. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It's not a doubt that is based on sympathy or prejudice, it's a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court, but also, and equally, on what the evidence does not tell the court. The fact that a person has been charged is in no way indicative of his or her guilt, and, of course, I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[15] In *R. v. Starr*, which is reported at 2 S.C.R. page 144, at paragraph 242, the Supreme Court of Canada held that an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law or at least in Canadian law. The prosecution here has only the burden of proving the guilt of ex-Leading Seaman Sharp beyond a reasonable doubt. To put it in perspective, if the court is convinced that the accused here is probably or likely guilty, then the accused shall be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[16] As often it appears at trial, it's not uncommon that sometimes the evidence may be contradictory. Here there is very little discrepancies other than the one that I mentioned before in the case. And with regard to credibility, as I said earlier and also counsel pointed out, credibility here is not an issue and some minor differences in the testimony may go to weight, but not really to the credibility of the witnesses. All witnesses testified in a straightforward manner to the best of their ability. Of course, taking into account the fact that the events took place a long time ago, over a year ago, and for that, of course, that explains sometimes the little differences. The court is also satisfied that no witnesses showed any bias in their testimony, and, of course, I accept their testimony as the court should. That means I would not diminish in any way, shape, or form their credibility or the weight attached to those testimonies. And I would add the same applies in this case to the accused, Leading Seaman Sharp or ex-Leading Seaman Sharp, who also testified in a very straightforward and credible manner. However, because the accused has testified on his own behalf in this case, the law still would require that the court find the accused person not guilty according to the *W.(D.)* test, first, if the court believes the accused, and, second, even if the court does not believe the accused, but the court still has a reasonable doubt as to the accused's guilt after considering the accused's evidence in the context of the evidence taken as a whole. And finally, if after careful consideration of all the evidence, the court is unable to

decided whom to believe, the court must find the accused not guilty. And I said, I believe the accused and his testimony does not contradict in any way, shape, or form the evidence of others. And also, he said that he has accepted the evidence, he is not disputing the evidence provided by other witnesses.

[17] So having instructed myself as to the onus of proof and the standard of proof, I will now examine the facts of the case as revealed by the evidence in light of the applicable legal principles.

Questions in Issue

The First Charge (Section 130 of the National Defence Act - Paragraph 267(a) of the Criminal Code)

[18] With regard to the questions in issue, at least as to the first charge, counsel for the defence simply referred the court to the application of the reasonable doubt in the matter. As the prosecution stated, this is a very simple case, at least based on the evidence before the court. There is no issue with the identity of the accused, the date and place where the offence was allegedly committed, the intentional and indirect use of force, as I would qualify it, as gentle as it may have been in the particular circumstances of this case where Leading Seaman Sharp used OC spray three times for less than one second each time on Corporal Esser and that as a joke and being it perceived as a joke by Corporal Esser. On the element of consent, the admission by the defence is clear, Corporal Esser did not consent to the accused spraying her with pepper spray. Therefore, use of force was not consented to even if she did not take real offence to it. There is also no issue with regard to the fact that OC spray, a prohibited weapon, was involved in this situation. Whether the particulars refer to the carrying of the weapon rather that to its use is not fatal in the circumstances of this case according to this court because the former is subsumed in the latter in the context of this case, and I cannot see how the defence could be prejudiced in the context of this case in preparing his defence. I would also add that the fact that the victim did not see a criminal offence being committed on herself is not determinative on whether the offence was committed or not, although it is clearly indicative of how serious she considered the situation; that is, a bad practical joke, nothing more.

[19] The defence submits that there is insufficient proof to show that Leading Seaman Sharp had any criminal intent when he used his pepper spray on Corporal Esser. Counsel for the defence further submits that the accused's only intent was to play a joke which, I would add, was clearly understood by the victim of the joke, Corporal Esser. However, the law is abundantly clear on the issue of the intentional use of force in the context of an assault under section 265 of the *Criminal Code*. Although, in the context of the offence of sexual assault, the Québec Court of Appeal in *R. v. Bernier*, (1997) 119 C.C.C. (3d) 467, affirmed at (1998) 124 C.C.C. (3d) 383 by the Supreme Court of

Canada, the Quebec Court of Appeal has stated the applicable legal principles with regard to the lack of violence or physical hostility in the use of force under section 265 of the *Criminal Code*. And I quote from page 473:

> The trial judge indicated that the evidence did not reveal the hostility required for an assault and, for this reason, he could not find the respondent guilty. The touchings alleged were committed in a context which is much more akin to a bad joke than violence.
>
> Does assault necessarily presuppose recourse to physical force or to some form of physical hostility? Are there not situations where the aggressor does not need to use force to violate the physical or sexual integrity of his victim?
>
> As its name indicates, sexual assault requires first and foremost an assault. This term is defined in s. 265(1) of the *Criminal Code*; s. 265(2) provides that this definition applies to all types of sexual assaults.
>
> *Assault*
>
> 265(1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> .....
>
> *Application*
>
> (2) This section applies to all forms of assault, including sexual assault...
>
> Section 265(1)(*a*) stipulates that the intentional application of force, whether directly or indirectly, is necessary in order to commit an assault. However, the term force is vague. What degree of force is necessary in order to constitute an assault? Does it have to be extreme force or can it just be slight?
>
> In this regard the Common Law has adopted a flexible approach to defining force. The authors Smith and Hogan adopted the notion of "intentional touching ... without consent and lawful excuse":
>
> An assault is an act by which D, intentionally or recklessly, causes P to apprehend immediate and unlawful personal violence [...] But "violence" here includes any unlawful touching of another, however slight, for as Blackstone wrote:
>
> *"the law cannot draw the line between different degrees of violence, and therefore prohibits the first*

> *and lowest stage of it; every man's person being sacred, and no other having the right to meddle with it, in any the slightest manner."*
>
> As Lane L.C.J. put it:
>
> "An assault is any intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile, or rude, or aggressive, as some of the cases seem to indicate." ...
>
> According to this definition, any intentional touching without lawful excuse is an assault.

[20] As I have said, the Supreme Court of Canada affirmed that case. To put it simply, a person who voluntarily does the acts constituting assault is guilty if his only defence is that his motive was to do a practical joke. The issue of whether to prosecute the offence in a particular set of circumstances is a real one. Upon review it may constitute an erroneous use of prosecutorial discretion, but this is not a matter that can be addressed by this court at this stage of the proceedings. In conclusion, the court is satisfied that the prosecution has met its burden of proof and that all essential ingredients of the offence as it relates to the first charge have been established beyond a reasonable doubt. But I've taken note, very clear notes of the comments made by defence counsel in his submissions on that issue.

The Second Charge (Section 130 of the National Defence Act - Subsection 86(1) of the Criminal Code)

[21] With regard to the second charge. As stated earlier, the second charge alleges a contravention of section 130 of the *National Defence Act* contrary to subsection 86(1) of the *Criminal Code*. The particulars of the charge read:

> In that he, on 12 November 2006, at Canadian Forces Base, 8 Wing Trenton, Trenton, Ontario, did, without lawful excuse, use a prohibited weapon To Wit: oleoresin capsicum (OC) spray, in a careless manner.

[22] The court also said that in order to find Leading Seaman Sharp guilty of careless use of a prohibited weapon that the prosecution must prove each of the essential elements beyond a reasonable doubt:

1. That Leading Seaman Sharp used a prohibited weapon;

2. that Leading Seaman Sharp used a prohibited weapon in a careless manner; and

3. that Leading Seaman Sharp had no lawful excuse for his use of the prohibited weapon.

[23] Based on the evidence before the court, the only issue here relates to whether Leading Seaman Sharp used the OC spray, a prohibited weapon, in a careless manner. The prosecution submits that the analysis should determine if Leading Seaman Sharp had the requisite *mens rea* at the time of the alleged offence. It's also submitted that the accused did not take the necessary precautions at the time as would have done a reasonable military police person trained in the use of intermediate weapons such as OC spray. The prosecution submissions are based on its analysis of the leading cases from the Supreme Court of Canada such as *Hundal, Creighton,* and *Gossett*.

[24] The defence basically relies on the same decisions to submit that not only the prosecution has failed to meet its burden of proof with regard to the requisite *mens rea*, but further submits that the evidence shows that Leading Seaman Sharp did, in fact, take the necessary precautions not to fall below the threshold of penal negligence in the circumstances. Counsel for defence argued that the actions of Leading Seaman Sharp were not careless, but deliberate, calculated, and with complete awareness of the substance used, OC spray. It was further argued that the surrounding atmosphere in place at the time of the alleged offence, in particular the reactions of Corporal Esser and Mrs Preston, indicate that people present were not aware of a problem, especially when the persons directly involved never complained.

[25] After both parties had completed their final submissions, the court provided them with the opportunity to make additional remarks further to the recent decision of the Supreme Court of Canada in *R. v. Beatty*, [2008] S.C.C. No. 5, which was delivered last week on 22 February 2008, which provides additional guidance with regards to penal negligence further to the leading cases of *Hundal* and *Creighton*.

[26] In *R. v. Beatty,* Charron J. emphasized that fundamental principles of criminal justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm which establishes the *actus reus* of the offence, but with the offender's mental state. The onus lies on the Crown to prove both the *actus reus* and the *mens rea*. Moreover, where liability for penal negligence includes potential imprisonment, as in the case under section 249 of the *Criminal Code*, the distinction between civil and penal negligence acquires a constitutional dimension [Para 6]. The court accepts that this statement applies equally in the context of the offence of careless use of a prohibited weapon under subsection 86(1) of the *Criminal Code*. The Supreme Court of Canada made it clear in *Hundal* [Tab 4 of the joint book of authorities] provided by counsel, that the *mens rea* can be established only when the prosecution can establish beyond a reasonable doubt that there is a marked departure from the standard of care expected of a reasonable person in the circumstances of the accused. The prosecution referred to that person as being a reasonable military police

person trained in the use of intermediate weapons such as OC spray. In her submissions, counsel for the prosecution submitted that such a reasonable person would have been expected to simply keep the OC spray canister in its holster in order to respect the standard of care required in the circumstances. With respect, the court believes that the analysis could not be reduced to this simple aspect because, as stated by McLachlin J., as she then was, in *R. v. Creighton* [Tab 3 of the book of authorities] and I quote:

> ... The law does not lightly brand a person as a criminal....

[27] In *Beatty,* Charron J. restated the test that was provided by Cory J. in *Hundal*, where, at paragraph 43, she made the following remarks, and I quote:

> ... I would therefore restate the test reproduced above as follows:
>
> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".
>
> (b) The *Mens Rea*
>
> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all of the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

[28] In the context of this case, the court would state that the test to meet the requisite *actus reus* of the offence under subsection 86(1) of the *Criminal Code* should be that the trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was using, without lawful excuse, a prohibited weapon in a careless manner or without reasonable precautions for the safety of others. The trier of fact must be satisfied beyond a reasonable doubt that the accused's objectively careless use was accompanied by the required *mens rea* which should, on the basis of all of the evidence including evidence about the accused's state of mind at the time of the alleged

offence, if any, that the careless use amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances.

[29] Under subsection 86 (1) of the *Criminal Code*, it is the manner in which the firearm or the weapon was used that would constitute the *actus reus*, not the consequence of the use. The consequence is only a factor that could assist the assessment of carelessness. For example, the fact that Corporal Esser, Mrs Preston, and Mr Sadler suffered various levels of discomfort as a result of Leading Seaman Sharp's use of the OC spray is not determinative of the issue. The evidence indicates that Leading Seaman Sharp limited his use of the pepper spray to three pointed short blasts that were less than one second each. He purposely aimed downwards behind his target who was military police partner Corporal Esser. It must be understood that a reasonable person in the same circumstances is not a military police person respecting the standard operating procedures in a real intervention such as a riot or a military police person in a classroom being taught for the first time about the proper use and effects of the pepper spray, as I said, for the first time. Rather, it is a person trained and competent with the use of such a weapon where the subject of the use is also a military police person with the same level of training and experience. However, using pepper spray in a confined building not equipped with proper ventilation could still meet the required *actus reus* even if its use is minimal, as we surely should expect people who voluntarily assume control of a weapon such as OC spray in a way that would implicitly show respect to the potential harm of that weapon on persons other than the specific person targeted, in this case Corporal Esser. In these circumstances, the court is satisfied that the *actus reus* was proved or was proven beyond a reasonable doubt.

[30] The situation is not so clear on the issue of the *mens rea* when the court considers the totality of the evidence, in particular with the evidence about the state of mind of Leading Seaman Sharp at the time of the alleged offence. There is no doubt that Leading Seaman Sharp showed a lack of care when he used the pepper spray, but the lack of care must be serious enough to merit criminal punishment not civil or disciplinary punishment or administrative punishment. Based on the totality of the evidence, I agree with the prosecution that using the pepper spray even in such small doses constituted a marked departure that would have been expected of a military police person in the same circumstances. However, the evidence of ex-Leading Seaman Sharp corroborates the testimony of Sergeant Bradshaw with regard to the safety precautions and potential effects of pepper spray. His evidence indicates that based on his knowledge, he took steps that he considered adequate in order not to unduly effect the recipient of his joke. He knew that Corporal Esser had a similar knowledge in the matter and made sure to spray very short blasts in a downward direction from behind and nowhere near the facial area. Based on the evidence, the court is not satisfied beyond a reasonable doubt that a military police person in his situation would have been aware that such a small quantity of pepper spray would have caused so much discomfort to Mr Sadler in his particular condition. As to Corporal Esser, she referred to her

burning sensation as simply an annoyance. So based on the totality of that evidence the court has a reasonable doubt, and that doubt must benefit ex-Leading Seaman Sharp.

Conclusion and Disposition

[31] Ex-Leading Seaman Sharp, for those reasons the court finds you guilty of the first charge and the court finds you not guilty of the second charge.

Colonel M. Dutil, C.M.J.

Counsel:

Major S.A. MacLeod, Directorate of Military Prosecutions
Counsel for Her Majesty The Queen
Lieutenant-Commander J.M. McMunagle, Directorate of Defence Counsel Services
Counsel for ex-Leading Seaman Sharp